**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**APPELLATE SIDE**

**WRIT PETITION NO. 5296 OF 2004.**

Suresh Kalu Kanade & others. .... Petitioners.

versu.

Vishnu Mhatrarba Kanade & others. .... Respondents.

Shri S.M.Gorwadkar for the Petitioners.

Shri P.N.Joshi for the Respondent No.1.

Shri Umesh Mankapure for Shri R.V.More for the Respondent No.2.

**CORAM : ABHAY S.OKA, J.**

**DATED : 9th December, 2004.**

**P.C.:**

1. Rule. The Respondents Nos.1 and 2 waive service. Service on the Respondent No.3 is dispensed with. The challenge in this petition filed by the original Defendants Nos.2 and 3 is to the Judgment and Order dated 12th February 2004 passed by the 4th Additional District Judge, Nashik. By the said order the Petitioners were restrained from running the flour mill in the suit premises till the final disposal of the suit filed by the Respondent No.1.

2. The learned Counsel appearing for the Petitioners invited my attention to the prayers made in the suit filed by the Respondent No.1. He pointed out that the suit was filed praying for perpetual injunction restraining the Respondent No.2-Municipal Corporation

from granting permission to the Petitioners for running a flour mill in the suit premises. A prayer was also made for a declaration that the Respondent No.2 has no right to grant permission in favour of the Petitioners to run the flour mill. Shri Gorwadkar, learned Counsel for the Petitioners submitted that the necessary permission was granted by the Respondent No.2-Corporation in favour of the Petitioners even before institution of the suit and therefore, the prayers made in the suit had become infructuous. He submitted that in any event there is no challenge in the suit to the permission granted by the Respondent No.2 in favour of the Petitioners. He stated that in the circumstances, the trial Court rejected the application for temporary injunction. He pointed out that the prayer made in the Application for temporary injunction was that the Respondent No.2 should be restrained from granting permission to the Petitioners to run the flour mill till the disposal of the suit. There was one more prayer made in the application for restraining the Respondent No.3 herein from granting electricity connection to the flour mill. He pointed out that the permission was already granted by the Respondent No.2 before institution of the suit and the electricity connection was also released by the Respondent No.3. He, therefore, submitted that no temporary injunction could have been granted on the basis of such prayers. He pointed out that though no injunction was specifically claimed by the Respondent No.1 against the Petitioners,

the Appellate Court while deciding the appeal has granted injunction against the Petitioners restraining them from running the flour mill. He pointed out that no such relief was sought by the Respondent No.1/original Plaintiff either in the plaint or in the application for temporary injunction. He, therefore, submitted that grant of such injunction by the Appellate Court was beyond the scope of the suit and application for temporary injunction.

3. Shri Joshi, learned Counsel appearing for the Respondent No.1/Plaintiff submitted that the Appellate Court was justified in granting injunction as a finding has been recorded that the flour mill was started by the Petitioner after ad-interim order of statusquo was passed by the Trial Court and the premises in which the flour mill is being run is unauthorisedly constructed. He, therefore, submitted that no interference was required with the discretionary order passed by the Appellate Court. He lastly submitted that the Respondent No.1 proposes to apply for amendment of the plaint for seeking appropriate reliefs and the application for amendment will be made within a period of four weeks from today. I have also heard the learned Counsel appearing for Respondent No.2.

4. After having perused the prayers made in the plaint as well as in the application for temporary injunction, I

find that the suit was essentially filed to prevent the Respondent No.2-Corporation from granting permission in favour of the Petitioners to run the flour mill. Perhaps at the time of institution of the suit, the Respondent No.1 was not aware of grant of permission by the Respondent No.2. As pointed out by the learned Counsel for the Petitioners, substantive prayer in the suit is for declaration that the Respondent No.2-Corporation has no right to grant permission in favour of the Petitioners and there is a substantive prayer for perpetual injunction restraining the Respondent No.2 from granting permission in favour of the Petitioners. After noting that the permission has been granted by the Respondent No.2-Corporation to the Petitioners and also after noting that the electric connection has been released by the Respondent No.3 in favour of the Petitioners, the order of temporary injunction has been granted by the Appellate Court. The Appellate Court has also noted that on the basis of the permission granted, the Petitioners have already commenced operation of the flour mill.

5. It is true that a primafacie finding has been recorded that the premises in which the flour mill is conducted is unauthorised and that the flour mill was started in violation of the order of statusquo. However, I am of the view that considering the prayers made in the plaint as it stands today, the learned Appellate Court could not have granted the temporary injunction in the

terms in which it was granted. The grant of such injunction was beyond the scope of the prayers made in the suit. Only on this ground the impugned order deserves to be quashed and set aside.

6. At this stage the learned Counsel appearing for the Respondent No.1 Shri Joshi submitted that the Respondent No.1 will take appropriate steps within a period of four weeks from today and considering the finding of the illegality recorded by the Appellate Court, the order of temporary injunction may be continued for a reasonable time. The said request is opposed by the learned counsel appearing for the Petitioners. Considering the fact that the order of the Appellate Court is being set aside on the limited ground narrated above, and considering the primafacie findings of alleged illegality recorded by the Appellate Court, in my view, the request made by Shri Joshi deserves to be granted.

7. Hence I pass the following order:

(i) The impugned judgment and order dated 12th February 2004 is quashed and set aside.

(ii) The order of interim injunction granted in terms of clause 3 of the operative part of the impugned order, however, will continue to operate for a period of six weeks from

today to enable the Respondent No.1 to apply for the amendment of plaint and to take appropriate proceedings, if so advised. It is made clear that the Application for amendment or the appropriate proceedings taken out by the Respondent No.1 will be decided on its own merits and the Petitioners, and the Respondents Nos.2 and 3 will be entitled to raise all permissible objections.

(iii) Rule in the above terms made absolute with no order as to costs.

(iv) Parties and the concerned Court to act on the authenticated copy of this order.

**Judge.**